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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1975

No. 74-6212

GREGORY B. NORTON, JR., a minor, by his next friend, MARION B. CHILES, Individually and on behalf of all others similarly situated,
Appellant,

vs.

F. DAVID MATHEWS, Secretary, Department of Health, Education, and Welfare, Individually and in his official capacity,
Appellee.

BRIEF OF AMICUS CURIAE JOHN J. ROMERO, JR., BY MELODY HENDRICKS, HIS NEXT FRIEND, IN SUPPORT OF APPELLANT GREGORY B. NORTON, JR.

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BRIEF OF AMICUS CURIAE JOHN J. ROMERO, JR., BY MELODY HENDRICKS, HIS NEXT FRIEND, IN SUPPORT OF APPELLANT GREGORY B. NORTON, JR.

I

INTEREST OF THE AMICUS CURIAE

John J. Romero, Jr., by his mother, Melody Hendricks, is the plaintiff in the case of *Hendricks v. Weinberger,* No. 74-1456, (N.D. Cal. December 20, 1974); (9th Cir. Appeal filed 2/12/75, No. 75-1525,

1975). He challenges the constitutionality of 42 U.S.C. § 416(h)(3)(C)(ii), the same statute which is challenged here by Gregory Norton. The decision of this Court in the case at hand will effectively resolve John J. Romero's challenge to the statute.

II

JURISDICTION

The first issue to be discussed here is the basis for this Court's jurisdiction over this appeal. Jurisdiction here depends upon the authority of the court below to issue an injunction against the operation of a federal statute for repugnance to the Constitution. If the court below had authority to issue such an injunction, then the three-judge court was properly convened, and direct appeal to this Court is appropriate, 28 U.S.C. § 2282 and 28 U.S.C. § 1253.

A. 42 U.S.C. § 405(g) AND THE ADMINISTRATIVE PROCEDURE ACT

Jurisdiction in the Court below was firmly based on the review provisions contained in the Social Security Act at 42 U.S.C. §§ 405(g) and (h). Those sections are set forth in Appendix A. They require that administrative remedies be exhausted before suit is filed in federal court. Whether or not the class exhausted its remedies, Norton clearly complied with 405(g) by exhausting his administrative remedies and filing a timely action in the District Court. The only issue before the three-judge court was the con-

stitutionality of the statute under which Norton was denied child's survivor's insurance benefits, 42 U.S.C. § 416(h) (3) (C) (ii). That issue was properly befor the court under 405(g), *Fleming v. Nestor,* 363 U.S. 603, at 607, (1960), *Weinberger v. Salfi,* 95 S.Ct. 2457 at 2466, (1975). Therefore the court below unquestionably had jurisdiction under 405(g) to determine the constitutionality of the statute he challenged.

Although the District Court's jurisdiction to review the constitutional issue under 405(g) is clear, the question of its authority to issue an injunction has been raised by this Court, *Salfi,* 95 S.Ct. 2457, at 2466 n. 8, and at 2478, n. 4. Amicus urges that if an injunction cannot be issued under 405(g), then it can be issued under the Administrative Procedure Act, 5 U.S.C. § 701-706, (hereinafter the "APA").

Section 405(g) provides for judicial review of a "decision of the Secretary". Section 405(h) precludes review of "decisions of the Secretary" under any statute but 405(g) and further provides that *no action* be reviewed under 28 U.S.C. § 1331. While this Court has held that "decision of the Secretary" includes a decision on the constitutionality of a federal statute, neither this Court nor any other court has decided whether "decision of the Secretary" includes a decision to enjoin a federal statute for repugnance to the Constitution. If "decision of the Secretary" *does* include a decision to issue an injunction, then that decision is reviewable under 405 (g), and the court below had the authority to affirm,

modify, or reverse that decision by issuing an injunction under 405(g) itself.[1]

If 405(g) does not provide the authority to issue an injunction, then an injunction can be issued under

[1]This Court has found jurisdiction in a case brought under 405(g) in which an injunction was requested, a three-judge court was convened, the injunction was denied and direct appeal to this Court was based upon 28 U.S.C. § 1253, *Jimenez v. Weinberger*, 417 U.S. 628 (1974).

Several courts have issued injunctions in class and individual actions under 405(g), see e.g., *Diaz v. Weinberger*, 361 F.Supp. 1 (S.D. Fla., 1973) (three-judge court) (set for reargument 95 S.Ct. 1346, 1975), and *Maracle v. Richardson*, 348 F.Supp. 234 (W.D. N.Y., 1972) (three-judge court). Others have found jurisdiction to review a request for an injunction under 405(g), convened a three-judge court under 2282 and 2284, and then denied the request for an injunction on the merits, see *Kohr v. Weinberger*, 378 F.Supp. 1299 (E.D. Pa. 1974) (three-judge court) vacated and remanded on other grounds, 43 U.S.L.W. 3682 (June 30, 1975), and *Bartley v. Finch*, 311 F.Supp. 876 (1970), aff'd 404 U.S. 980 (1971).

In *Wiesenfeld v. Secretary of HEW*, 337 F.Supp. 981 (D.N.J., 1973) (three-judge court), the district court found jurisdiction under 28 U.S.C. § 1331 and explicitly refused to consider whether jurisdiction existed under 405(g). *Id.* at 986. In its review of that case *sub nom. Weinberger v. Wiesenfeld*, 420 U.S. ....., 95 S.Ct. 1225, this Court affirmed the existence of jurisdiction under § 1331. *Id.* 95 S.Ct. at 1230, ftn. 10. There was no discussion in the *Wiesenfeld* opinion of whether jurisdiction existed under 405(g). A few months after *Wiesenfeld*, the Court ruled in *Weinberger v. Salfi*, ... U.S. ....., 95 S.Ct. 2457, that jurisdiction under 405(g) prohibited jurisdiction under 28 U.S.C. § 1331. Although the holding in *Salfi* on § 1331 would appear to overrule the holding in *Wiesenfeld* on § 1331 jurisdiction, the only discussion relevant to this relationship between the two cases is found in footnote 10 of the *Salfi* opinion:

> Section 405(g) jurisdiction in *Weinberger v. Wiesenfeld*, 420 U.S. ....., 95 S.Ct. 1225, 43 L.Ed.2d 514 (1975), was similarly present. *Salfi*, supra, 95 S.Ct. at 2468, ftn. 10.

Assuming that jurisdiction was founded on 405(g) in *Wiesenfeld*, and since this Court affirmed the issuance of an injunction against the Secretary in *Wiesenfeld*, the *Wiesenfeld* case would stand for the proposition that 405(g) includes the jurisdiction to issue an injunction.

the APA. The APA is fully set forth in Appendix B. § 701(a) of the APA states that it applies except to the extent that statutes preclude judicial review. Since 405(h) does not specifically mention the APA as a forbidden basis of jurisdiction, its use is only precluded if review is exclusively available under 405(g).[2] Review is exclusively available under 405 (g) for a "decision of the Secretary". If the decision to issue an injunction is a "decision of the Secretary", then review is exclusively available and an injunction can be issued.

While 405(g) is undoubtedly the exclusive method of review of a "decision of the Secretary", it does not restrict judicial review of a decision which the Secretary cannot make. Therefore, if "decision of the Secretary" does not include a decision to enjoin a federal statute for repugnance to the Constitution, then review is not exclusively available under 405(g). If review is not exclusively available under 405(g), then the APA applies.

It is clear that the APA is to be applied in conjunction with statutes which grant jurisdiction. The Court clearly has jurisdiction under 405(g) to review the constitutionality of the statute. Therefore the provisions of the APA are appropriately applied in

[2]In other contexts courts have held that 405(h) does not preclude review where the relief requested is unavailable under 405(g); *Rothman v. Hospital Service of Southern California*, 510 F.2d 956 (9th Cir. 1975); *Kingsbrook Jewish Medical Center v. Richardson*, 486 F.2d 663 (2d Cir. 1973); *Aquavella v. Richardson*, 437 F.2d 397 (2d Cir. 1971); *Cappadora v. Celebrezze*, 356 F.2d 1 (2d Cir. 1966).

conjunction with 405(g).[3] This Court has rendered at least nine decisions in which, where statutory jurisdiction was established, the review provisions of the APA were applied in addition to those mentioned in the statute granting jurisdiction, *Bowman Transportation, Inc. v. Arkansas-Best Freight Systems, Inc.*, 95 S.Ct. 438 (1974) (APA applied in conjunction with 28 U.S.C. 1336); *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971) (jurisdiction based on 49 U.S.C. 1655(h) and the APA); *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150 (1970) (APA used in conjunction with the National Bank Act, 12 U.S.C. 24, subd. 7, 1864); *Camp v. Pitts*, 411 U.S. 138 (1973) (APA used with the National Bank Act, 12 U.S.C. 24 subd. 7, 1864); *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967) (APA applied in conjunction with 28 U.S.C. 2201); *Toilet Goods Association v. Gardner*, 387 U.S. 158 (1967) and *Gardner v. Toilet Goods Association*, 387 U.S. 167 (1967) (APA applied in conjunction with 28 U.S.C. 2201); *Rusk v. Cort*, 369 U.S. 367 (1962) (APA applied in conjunction with 28 U.S.C. 2201); *Brownell v. We Shung*, 352 U.S. 180 (1956) (APA applied with the Immigration and Nationality Act, 8 U.S.C. 1105(a) (9) (b)); *Shaughnessy v. Pedreiro*, 349 U.S. 48 (1955) (APA applied with the Immigration and Nationality Act, 8 U.S.C. 1105(a) (9) (b)).

[3]Although it is possible to argue that the APA provides an independent basis of jurisdiction, *Weinberger v. Hynson, Westcott and Dunning, Inc.*, 412 U.S. 609 at 627 (1973), it is not necessary to find independent APA jurisdiction here, since jurisdiction is clearly established under 405 (g).

Congress provided for the application of the APA in conjunction with other statutes in order to provide a reasonably uniform system of judicial review, H.R. No. 1980, 79th Cong., 2nd Sess. (1946), U.S. Code Congressional Service (1946) 1197 at 1203, 1204. The APA was thus meant to fill in essential requirements and to confer numerous procedural rights. *Id.* at 1198. The legislative history of the APA and decisions of this Court show that Congress intended that the APA be applied in conjunction with other statutes. In this case, if 405(h) does not preclude APA review, then the APA must be applied with 405(g).[4]

[4]The remaining prerequisites for APA jurisdiction are easily established here. Section 701 states that the action complained of is not subject to review under the APA if it is committed by law to agency discretion. This Court has specifically found that a decision of the Secretary to apply an allegedly unconstitutional statutory restriction is "nondiscretionary", *Weinberger v. Salfi, supra*, at 4989. This Court has further held that it is "beyond the power of the Secretary" to affect the plain wording of a statute which is alleged to be unconstitutional and that the constitutionality of a statute is "beyond his jurisdiction to determine", and that "a matter of constitutional law is concededly beyond his competence to decide", *Weinberger v. Salfi, supra*, at 4989 and 4990.

Section 702 states that review is available to a person suffering legal wrong because of agency action within the meaning of a relevant statute. Norton claims that he is entitled to social security benefits. He has been denied those benefits by the Social Security Administration. He is unquestionably a person adversely affected or aggrieved by agency action and claims that he is suffering a legal wrong because of agency action. He is such a person within the meaning of "a relevant statute" (Sec. 405(g)) in that he is an individual who was a party to a hearing and has received a final decision of the Secretary.

Sections 703 and 704 state that the APA applies if the statutory review procedure is inadequate. If 405(g) does not provide for review of a request for an injunction, then it is inadequate, because Norton has requested an injunction.

Section 706 provides that constitutional issues are properly raised under the APA.

The inescapable conclusion is that Norton's request for an injunction must be reviewed under either 405(g) alone or under 405(g) in conjunction with the APA. While review can be avoided under one or the other of the statutes, it cannot be avoided under both. The avoidance of review under one compels review under the other. Thus the court below had authority to issue an injunction, a three-judge court was properly convened, and direct appeal is to this Court.

B. 28 U.S.C. § 1361

28 U.S.C. § 1361 provides an independent source of jurisdiction and the court below found jurisdiction under § 1361, *Norton v. Richardson,* 352 F.Supp. 594, 598 (D. Md. 1972); *Norton v. Weinberger,* 364 F. Supp. 1117, 1119 (D. Md. 1973) (three-judge court). This section states:

> The district courts shall have original jurisdiction of an action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.

The legislative history of § 1361 demonstrates that Congress intended all the district courts to have mandamus jurisdiction as previously exercised over federal officers by the district court in the District of Columbia. Senate Report No. 1992, 87th Cong. 2nd Sess. (1962), 1962 U.S. Code Cong. & Admin. News 4327. See also Byse & Fiocca, "Section 1361 Mandamus and Venue Act of 1962 and 'Nonstatutory' Judicial Review of Federal Administrative Action", 81 Harv. L. Rev. 308, 308-318 (1967). This Court has previously held that the district court in the District of Columbia has mandamus jurisdiction to enforce the constitutional duties of federal officers. U.S. ex rel. *Turner v. Fisher,* 222 U.S. 204 (1911).[5]

In this case the duty owed to the plaintiff by the Secretary does arise from the Constitution. Although this Court has never interpreted § 1361, all of the circuits which have considered the question have found that jurisdiction may exist where the alleged duty arises from the Constitution. *National Ass'n of Gov't Employees v. White,* 418 F.2d 1126, 1129 (D.C. Cir. 1969); *Ashe v. McNamara,* 355 F.2d 277, 280 (1st Cir. 1965); *Langevin v. Chenango Court, Inc.,* 447 F.2d 296, 300 (2nd Cir. 1971); *Richardson v. United States,* 465 F.2d 844, 849-51 (3d Cir. 1972) *(en banc) rev'd on other grounds,* 418 U.S. 160 (1974); *Burnett v. Tolson,* 474 F.2d 877, 880-81 (4th Cir. 1973); *Carter v. Seamans,* 411 F.2d 767, 772-73 (5th Cir. 1969), *cert. den.* 394 U.S. 934 (1969); *Walker v. Blackwell,* 360 F.2d 66, 67-69 (5th Cir. 1966); *Mead v. Parker,* 464 F.2d 1108, 1110-12 (9th Cir. 1972); *Smith v. McNamara,* 395 F.2d 896, 899-900 (10th Cir. 1968); *Martinez v. Richardson,* 472 F.2d 1121, 1125-26, ftn. 12 (10th Cir. 1973). Four district court opinions are

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[5]This Court has also held that mandamus may issue to compel state officials to perform a constitutional duty, *State of Missouri ex rel. Gains v. Canada,* 305 U.S. 337 (1938); *Sipuel v. Board of Regents,* 332 U.S. 631 (1948) *accord Board of Liquidation v. McComb,* 2 Otto 531, 92 U.S. 623 (1876); *Pennoyer v. McConnaughy,* 140 U.S. 1 (1891).

also frequently cited in support of this proposition, *Murray v. Vaughn,* 300 F.Supp. 688, 696-97 (D.R.I. 1969); *Fifth Avenue Peace Parade Committee v. Hoover,* 327 F.Supp. 238, 243 (S.D.N.Y. 1971); *Cortright v. Resor,* 325 F.Supp. 797, 812 (E.D.N.Y. 1971); and *Kelley v. Metropolitan County Board of Education,* 372 F.Supp. 528, 538-39 (M.D. Tenn. 1973).

In their exercise of § 1361 jurisdiction, the courts may not interfere with the legitimate exercise of administrative discretion, but may only compel the performance of those duties required by law.[6] Since the only issue in this case is a legal one concerning the constitutionality of 42 U.S.C. § 416(h)(3)(C) (ii) the Secretary's discretion is not involved.

The jurisdictional requirements of § 1361 may be satisfied by allegations of the existence of a non-discretionary legal duty owed to the plaintiff. In order to establish jurisdiction it is not necessary to decide the merits of the case and conclude that it is actually appropriate to issue the writ. Norton's allegations are sufficiently substantial to give the three-judge court the power to consider the case and to decide whether to issue the writ of mandamus, *West Coast Exploration v. McKay,* 213 F.2d 582, 590-92 (D.C. Cir. 1954) *cert. den.* 347 U.S. 989 (1954); *Carter v.*

[6]The legislative history of § 1361 makes clear that the courts may ". . . issue orders compelling Government officials to perform their duties and to make decisions in matters involving the exercise of discretion, but not to direct or influence the exercise of the officer or agency in the making of the decision." S.Rep. No. 1992, 87th Cong. 2nd Sess. (1962); 1962 U.S. Code Cong. & Admin. News 4326, 27.

Seamans, supra, 411 F.2d at 770, *see, e.g. Hagans v. Lavine,* 415 U.S. 528 (1974).

When Congress enacted § 1361, they were mindful of technical obstacles which frustrated the ability of ordinary citizens to obtain judicial review of the actions of federal officials. Congress specifically rejected a policy of tailoring "our judicial processes to the convenience of the Government rather than to provide readily available, inexpensive judicial remedies for the citizen who is aggrieved by the workings of Government." Senate Rp't 1992, *supra,* 1962 U.S. Code Cong. & Admin. News at 4328. Technical restrictions on § 1361 jurisdiction could defeat the ameliorative purposes of Congress and impede citizens who seek no more than that a federal officer perform his duty. *See generally, Byse & Fiocca, supra;* Davis, Administrative Law Treatise § 23.10 (1970 Supp.).

III

42 U.S.C. § 416(h)(3)(C)(ii) IS UNCONSTITUTIONAL

In order for a child to obtain survivor's benefits under Title II of the Social Security Act, 42 U.S.C. §§ 401 *et seq.,* the child must be dependent, 42 U.S.C. § 402(d)(1)(C). However, all legitimate children are presumed dependent, 42 U.S.C. § 401(d)(3). Illegitimate children may also receive the benefit of this presumption if their parents performed a seemingly valid marriage ceremony [§ 416(h)(2)(B)] or if the deceased insured had acknowledged the illegitimate child in writing [§ 416(h)(3)(C)(i)(I)] or if a court

had decreed the deceased insured to be the father [§ 416(h)(3)(C)(i)(II)] or if the deceased insured had been ordered to support his illegitimate child [§ 416(h)(3)(C)(i)(III)]. None of these children must prove dependency. For each of these categories the law creates a presumption of dependency. However, illegitimate children not fitting into any of these categories must prove both that the insured individual was their father and that

> such insured individual was living with or contributing to the support of the applicant at the time such insured individual died.
> [§ 416(h)(3)(C)(ii)].

This provision creates a separate classification of illegitimate children. Although these children can prove to the satisfaction of the Secretary that the deceased insured was their father, this class of illegitimate children is denied the presumption of dependency.

The legislative history demonstrates that the purpose of these provisions was to replace support lost by the death of the father. The survivorship benefits are described as:

> . . . [A] national program that is intended to replace the support lost by a child when his father . . . dies . . . S. Rep. No. 404, 89th Cong., 1st Sess. 101; 1965 U.S. Code Cong. & Admin. News 1943 at 2050.

Although Congress intended survivor benefits to replace "lost support", most children were not required to prove that their deceased fathers were actually

supporting them, 42 U.S.C. §§ 401(d)(3), 416(h)(2)(B), 416 (h) (3) (C) (i). However, proof of actual support would be unnecessary for children who were legally entitled to support and who, because of their father's death, lost the ability to enforce the support obligation against their father's wages. The loss of an economically valuable right, such as the right to enforce support, is equivalent to an actual loss which the survivor's benefits were intended to replace.

In contrast the category of illegitimate children to which Norton belongs did not generally possess a right to support in 1965. In order for this group to show that they had lost support on account of the death of their fathers, Congress required them to prove that they actually received support from their fathers.

Thus, Congress determined that a child could establish "lost support" either by proof of actual support or by membership in a group of children who were legally entitled to support. Legislative history provides abundant support for this interpretation of Congressional intent. The Senate Report states that eligibility depended on whether "the father was supporting the child or had a legal obligation to do so". Senate Report No. 404, *supra,* 1965 U.S. Code Cong. & Admin. News at 1958. Similarly Congressman Wilbur Mills, Floor Manager of the bill containing these provisions, explained that the test for a child was "if the father was supporting the child or had a legal obligation to do so". House-Senate Committee Conference Report on 1965 Amendments to the Social

Security Act, 111 Cong. Rec. 18387 (July 27, 1965). Likewise the Advisory Council on Social Security reported to Congress that a child's eligibility should no longer depend on his rights to inherit intestate personal property under state law:

> "The Council believes that in such a program whether a child gets benefits on the earnings record of a person who has been determined to be his father *and who has an obligation to support him* should not depend on whether he can inherit that person's intestate personal property under the laws of the state in which the person happens to live." Report of the Advisory Council on Social Security, The Status of the Social Security Program and Recommendations for its Improvement, 67 (Washington, D.C., 1965). (emphasis added).

Thus, Congress established a system of providing benefits to those who had an enforceable right to support and to those without such a right who could prove actual support.

However, the state of the law changed in 1973, when this Court found that legitimate and illegitimate children have an identical right to enforce support. In *Gomez v. Perez,* 409 U.S. 535 (1973), the Court held that once a state creates a judicially enforceable right for legitimate children to obtain support from their fathers, that same right to enforce support must exist for illegitimate children. In light of this recent decision, Norton and his class possess a judicially enforceable "right to support." Section 416(h) (3) (C) (ii) now operates to discriminate between classes of children, all of whom possess the right to support, by requiring only illegitimate children to prove any actual support. Neither the illegitimate children, nor the legitimate children can enforce their right to support because of the death of their fathers. Both the legitimate and the illegitimate children have lost the support which survivor's benefits were intended to replace. Under such circumstances the requirement that certain illegitimate children prove actual dependency is an irrational classification and an invidious discrimination against them. *Levy v. Louisiana,* 391 U.S. 68 (1968); *Glona v. American Guarantee & Liability Insurance Co.,* 391 U.S. 73 (1968); *Weber v. Aetna Casualty & Surety Co.,* 406 U.S. 164 (1972); *Jimenez v. Weinberger,* 417 U.S. 628 (1974).

In *Frontiero v. Richardson,* 411 U.S. 677 (1973), the Court found unconstitutional a statutory scheme very similar to this one. In *Frontiero,* the statutes presumed that wives were dependent on their working husbands, while working wives were required to prove that their husbands were dependent on them. Similarly the statutes at issue here presume that legitimate children are dependent while Norton's class of illegitimate children must prove dependency. In *Frontiero,* the discrimination was against women; in *Norton,* the discrimination is against illegitimate children.

The irrationality of this discrimination against illegitimate children is further dramatized by the fact that their eligibility is made to depend upon the actions of their father over whom they have no control. In *Weber, supra,* the Court condemned another statutory scheme that operated to the same effect:

> [I]mposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. *Id.* at 175.

These illegitimate children have lost support because the deaths of their fathers prevent them from obtaining the economic benefits of a support order in court. The Social Security Act denies benefits because the fathers successfully avoided their legal obligations to support their own children. In so doing the government of the United States reinforces the reprehensible conduct of the fathers. The operation of this statute against illegitimate children is plainly and simply irrational.

IV

CONCLUSION

For the reasons stated above, amicus urges this Court to find jurisdiction over this appeal and to reverse summarily the judgment of the court below and enjoin the operation of 42 U.S.C. § 416(h) (3) (C) (ii) for repugnance of the Constitution.

Dated, August 29, 1975.

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(Appendices Follow)

APPENDIX

Appendix A

42 U.S.C. §§ 405(g) and (h):

(g) Any individual, after any final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow. Such action shall be brought in the district court of the United States for the judicial district in which the plaintiff resides or has his principal place of business, or, if he does not reside or have his principal place of business within any such judicial district, in the United States District Court for the District of Columbia. As part of his answer the Secretary shall file a certified copy of the transcript of the record including the evidence upon which the findings and decision complained of are based. The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Secretary, with or without remanding the cause for a rehearing. The findings of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive, and where a claim has been denied by the Secretary or a decision is rendered under subsection (b) of this section which is adverse to an individual who was a party to the hearing before the Secretary, because of failure of the claimant or such individual to submit proof in conformity with any regulation prescribed under subsection (a) of this section, the court shall review only

the question of conformity with such regulations and the validity of such regulations. The court shall, on motion of the Secretary made before he files his answer, remand the case to the Secretary for further action by the Secretary, and may, at any time, on good cause shown, order additional evidence to be taken before the Secretary, and the Secretary shall, after the case is remanded, and after hearing such additional evidence if so ordered, modify or affirm his findings of fact or its decision, or both, and shall file with the court any such additional and modified findings of fact and decision, and a transcript of the additional record and testimony upon which his action in modifying or affirming was based. Such additional or modified findings of fact and decision shall be reviewable only to the extent provided for review of the original findings of fact and decision. The judgment of the court shall be final except that it shall be subject to review in the same manner as a judgment in other civil actions. Any action instituted in accordance with this subsection shall survive notwithstanding any change in the person occupying the office of Secretary or any vacancy in such office.

(h) The findings and decisions of the Secretary after a hearing shall be binding upon all individuals who were parties to such hearing. No findings of fact or decision of the Secretary shall be reviewed by any person, tribunal, or governmental agency except as herein provided. No action against the United States, the Secretary, or any officer or employee thereof shall be brought under section 41 of Title 28 to recover on any claim arising under this subchapter.

Appendix B

The Administrative Procedure Act, 5 U.S.C. §§701-706:

§ 701. Application; definitions

(a) This chapter applies, according to the provisions thereof, except to the extent that—

(1) statutes preclude judicial review; or

(2) agency action is committed to agency discretion by law.

(b) For the purpose of this chapter—

(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include—

(A) the Congress;

(B) the courts of the United States;

(C) the governments of the territories or possessions of the United States;

(D) the government of the District of Columbia;

(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

(F) courts martial and military commissions;

(G) military authority exercised in the field in time of war or in occupied territory; or

(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; chapter 2 of title 41; or sections 1622, 1884, 1891-1902, and former section 1641(b) (2), of title 50, appendix; and

(2) "person", "rule", "order", "license", "sanction", "relief", and "agency action" have the meanings given them by section 551 of this title.

§ 702. Right of review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

§ 703. Form and venue of proceeding

The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.

§ 704. Actions reviewable

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

§ 705. Relief pending review

When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review. On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court, including the court to which a case may be taken on appeal from or on application for certiorari or other writ to a reviewing court, may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings.

§ 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of any agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.